IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned On Briefs May 29, 2007

LENNIE GEORGE v. ALEXANDER AUTOMOTIVE, LLC, d/b/a ALEXANDER TOYOTA

Direct Appeal from the Circuit Court for Williamson County
No. 04468 Robbie T. Beal, Judge

No. M2006-02655-COA-R3-CV - Filed September 19, 2007

The trial court dismissed this action for malicious prosecution because it was filed beyond the one-year limitations period. On appeal, Plaintiff/Appellant asserts he was entitled to rely on incorrect information provided by the court clerk regarding the judgment date of the malicious prosecution suit resolved in Appellant's favor to toll the limitations period. We affirm dismissal.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; and Remanded

DAVID R. FARMER, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and HOLLY M. KIRBY, J., joined.

Jeffrey O. Powell, Goodlettsville, Tennessee, for the appellant, Lennie George.

David H. King, Franklin, Tennessee, for the appellee, Alexander Automotive, LLC, d/b/a Alexander Toyota.

OPINION

This dispute once again illustrates the dangers inherent in waiting until the last possible moment to file a claim. This appeal arises from a claim for malicious prosecution filed two days beyond the one-year limitations period provided by Tennessee Code Annotated § 28-3-104. The facts relevant to this appeal are undisputed. Plaintiff/Appellant Lennie George (Mr. George) was arrested in Williamson County and charged with writing a worthless check following a disagreement with and charges pressed by Defendant/Appellee Alexander Automotive, LLC d/b/a Alexander Toyota ("Alexander Automotive"). The criminal charges against Mr. George were dismissed on July 27, 2003.

Sometime in mid-2004, Mr. George decided to pursue an action for malicious prosecution against Alexander Automotive. Legal counsel for Mr. George telephoned the Williamson County

Clerk's office to inquire about the date the final judgment was entered dismissing the criminal case, and was told that, according to the computer records, which were later found to be erroneous, the case had been dismissed on July 29, 2003. Mr. George's complaint for malicious prosecution against Alexander Automotive was filed on July 29, 2004.

Apparently, Alexander Automotive did not file an answer but, pursuant to an agreement entered into by the parties during the course of their 2003 negotiations, the matter was set to be settled by arbitration in November 2005. However, as a result of becoming aware of a possible statute of limitations "snag," the parties returned to court to seek ruling on the statute of limitations question. On September 11, 2006, Alexander Automotive filed a motion to dismiss based on the one-year limitations period or, in the alternative, based an the parties' agreement to arbitrate. The trial court entered final judgment dismissing the matter on November 6, 2006, and this appeal ensued.

Issues Presented

Mr. George raises the following issue for our review:

(1) Whether the Plaintiff's failure to timely file the complaint should be excused due to a mistake in the clerk's office.

(2) Whether the Defendant waived its statute of limitations defense by failing to timely assert it.

Standard of Review

The issues presented are questions of law. We review questions of law *de novo*, with no presumption of correctness afforded to the trial court. *Taylor v. Fezell*, 158 S.W.3d 352, 357 (Tenn. 2005).

Analysis

We begin our analysis with Mr. George's assertion that Alexander Automotive waived the defense of the statute of limitations by failing to raise it in an answer and by not asserting the defense in a timely manner. In light of the procedural history of this case, this argument is without merit. We note, as an initial matter, that in his July 29, 2004, complaint, Mr. George asserted, "[o]n July 29, *2004,* the criminal charges against Plaintiff were dismissed." (Emphasis added.) The complaint does not appear to have been amended. We also note that Alexander Automotive filed no answer in this matter. The only responses filed by Alexander Automotive which appear in the record before us are an August 2006 motion to set for trial and the September 2006 motion to dismiss. Further, sometime before November 2005, the matter was referred to arbitration, and it was in November 2005, during the pendency of arbitration, that the parties became aware of the statute of limitations "snag." Thus, although Alexander Automotive waited an additional ten months to file its motion

to dismiss, Mr. George cannot in good faith submit that he was somehow surprised or prejudiced by the motion. Clearly, the matter was referred back to the court specifically for resolution of the statute of limitations issue. Unlike *Poss v. Turner*, No. M2005-01008-COA-R3-CV, 2007 WL 187811 (Tenn. Ct. App. Jan. 24, 2007)(*no perm. app. filed*), for example, where we affirmed the trial court's refusal to dismiss the matter based on the statute of limitations where the defense had not been raised in the written pleadings or written responses but was first asserted in an oral motion made by counsel at trial, the late assertion of the defense in this case resulted in neither surprise nor prejudice to Mr. George. Further, as Alexander Automotive asserts, Rule 12.02(6) of the Tennessee Rules of Civil Procedure permits the defense of "failure to state a claim upon which relief can be granted" to be raised by motion before a pleading if a further pleading is permitted. Tennessee case law is replete with cases dismissed in the trial court based on the statute of limitations defense raised in a Rule 12.02 motion to dismiss. *See, e.g., Edwards v. Allen*, 216 S.W.3d 278 (Tenn. 2007).

We accordingly turn to Mr. George's assertion that the statute of limitations should be tolled in this case where he relied on incorrect information supplied by the court clerk. It is undisputed that an action for malicious prosecution must be commenced within one year after the cause of action accrued. T.C.A. § 28-3-104(a)(1)(2000). Additionally, "[a] cause of action for malicious prosecution accrues when a malicious [prosecution] suit is finally terminated in the defendant's favor." *Christian v. Lapidus*, 833 S.W.2d 71, 73 (Tenn. 1992)(citations omitted). In this case, the clerk's computer records indicated that the criminal action was terminated on July 29, 2003, when physical examination of the judgment revealed that it was entered on July 27, 2003. Mr. George, or rather Mr. George's counsel, asserts that he was entitled to rely on the information provided by the clerk's office, however, and that the statutory period should be tolled by this reliance. We disagree.

In his brief to this Court, Mr. George asserts:

> It was reasonable for Plaintiff's counsel to call the clerk's office instead of trying to remember a date one year before or trying to find the date on his calendar. General Sessions criminal cases quite often get continued for only a day or two. It's possible that an attorney would not write that date down in his calendar since it's the next day. It would be more prudent after the passing of a year to call the clerk's office and inquire about when the judgment was entered. That's what Plaintiff's counsel did in this case. Plaintiff, therefore, reasonably relied on this date and it's that reasonable reliance, and that reasonable reliance only, that caused Plaintiff to file the Complaint after the statute of limitations had run.

In this case, it is clear that Mr. George and his counsel had actual knowledge of the date the criminal court judgment was entered dismissing the case against Mr. George, and that counsel simply chose a short-cut around accurate record keeping. This is not reasonable reliance. This Court has noted that a court clerk's failure to mark a pleading or paper as filed is not fatal to a party's assertion that it was, in fact, timely filed. *Selvy v. Vinsant*, No. 03A01-9903-CV-00081, 1999 WL 894435 (Tenn. Ct. App. Oct. 13, 1999)(citing *Dunlap v. Ayers*, 1999 WL 236514 (Tenn. Crim. App. Apr.

23, 1999). An error on the part of the clerk to mark a pleading as filed will not prejudice the party who properly files it. *Id.*

In this case, final judgment in the criminal court undisputedly was entered on July 27, and not July 29. If we were to hold as Mr. George urges, the error on the part of the clerk would necessarily prejudice the Defendant, Alexander Automotive, who apparently discovered the correct judgment date upon prudent examination of the judgment itself.

In light of the increasing use of and dependency on technology to file pleadings and papers in the court, we do not hold that a computer data entry error in the clerk's office would never be held to result in reasonable reliance on that error. However, the equities in this case do not support such a holding here, where reliance on the court clerk was nothing more than a short-cut around or substitute for accurate record keeping by an attorney.

Holding

In light of the foregoing, the judgment of the trial court is affirmed. Costs of this appeal are taxed to the Appellant, Lennie George, and his surety, for which execution may issue if necessary.

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DAVID R. FARMER, JUDGE